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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 OBESITY RESEARCH
11 INSTITUTE, LLC,

12 Plaintiff,

13 v.

14 FIBER RESEARCH
15 INTERNATIONAL, LLC,

16 Defendant.

Case No.: 15-cv-0595-BAS-MDD

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR
RECONSIDERATION**

[ECF NO. 249]

17 BACKGROUND

18 Before the Court is Plaintiff's Motion to Reconsider this Court's Order
19 dated April 8, 2016, in which the Court struck certain supplemental witness
20 disclosures. (*See* ECF No. 205). Specifically, the Court struck the
21 supplemental disclosures of Brian Salerno as a fact witness (the designation
22 of Mr. Salerno as a non-retained expert witness was left intact), Wendi Wang,
23 Ron Ovadia, Steven Snyder, Gayle Bensussen, certain 30(b)(6) witnesses,
24 Patience Hannah, Angela Emmerson, Bradley Sutton and Jamie Stein.
25 Plaintiff urges to the Court to reconsider its ruling striking Brian Salerno as
26 a fact witness, Wendi Wang, Ron Ovadia and Steven Snyder. The motion to

1 reconsider was filed on May 6, 2016. (ECF No. 249). Plaintiff asserts that
2 that reconsideration is warranted because “maintaining an erroneous ruling
3 in light of evidence to the contrary is manifestly unjust and warrants relief.”
4 (ECF No. 249-1 *5 (the Court will refer throughout to the pagination
5 provided by CM/ECF rather than original page numbers of the filed
6 documents)).

7 Defendant responded on May 24, 2016, that the motion is untimely and,
8 in any event, correct. (ECF No. 262). Plaintiff replied on May 31, 2016.
9 (ECF No. 265)

10 ANALYSIS

11 1. Timeliness

12 Civil Local Rule 7.1(i)(2) of this Court allows for motions to reconsider
13 to be filed within 28 days of the order sought to be reconsidered. By this
14 measure, Plaintiff’s motion to reconsider was timely, although just barely.
15 There is some tension between this local rule and Fed. R. Civ. P. 72(a)
16 providing that a party has 14 days to object before the district judge to any
17 non-dispositive order of the magistrate judge. That tension does allow for a
18 measure of unfortunate gamesmanship: A party fully intending to object to
19 an order of a magistrate judge can effectively extend the time to do so by first
20 moving the magistrate judge to reconsider the ruling. On the other hand,
21 providing the magistrate judge an opportunity to reconsider a ruling based
22 upon new evidence, a change in the law, or upon demonstration of clear error,
23 provides some efficiency by relieving the district judge of a potentially
24 unnecessary burden. The Court finds that the benefits of providing a vehicle
25 for reconsideration through the local rule is not inconsistent with Rule 72.
26 Plaintiff’s motion was timely.

1 2. Merits

2 The crux of Plaintiff's argument is that the Court applied a more
3 stringent standard, the so-called "functional equivalent" test rather than the
4 "otherwise made known" test provided in Rule 26(e)(1), Fed. R. Civ. P.
5 Plaintiff has misunderstood the Court's ruling. Rule 26(e)(1) provides that a
6 supplement is not required if additional or corrective information to an
7 incomplete or incorrect disclosure has "otherwise been made known to the
8 other parties during the discovery process or in writing." The issue before the
9 Court, regarding some of the challenged disclosures, was the extent of the
10 information that was "made known" to determine whether supplementation
11 was required or excused. In that regard, the Court relied upon and expressly
12 cited *Poitra v. School District No. 1*, 333 F.R.D. 659, 666 (D. Colo. 2015). The
13 Court did not quote a specific passage in *Poitra* which may have led to
14 Plaintiff's confusion. The specific passage relied upon by the Court is set
15 forth here:

16 And finally, a reasonable interpretation of Rule 26(e)(1)(A) and its
17 reference to "incomplete or incorrect" disclosures presumes that the
18 "additional or corrective information...otherwise made known...during
19 the discovery process" will provide the functional equivalent of the
20 information required under Rule 26(a)(1)(A). Cf. *L-3 Communications*
21 *Corp. v. Jaxon Engineering & Maintenance, Inc.*, No. 10-cv-02868-MSK-
22 KMT, —F.Supp.3d —, —, 2015 WL 5117792, at *8 (D.Colo. Sept.
23 1, 2015) ("To satisfy the 'made known' requirement, a party's collateral
24 disclosure of the information that would normally be contained in a
25 supplemental discovery response must be in such form and of such
26 specificity as to be the functional equivalent of a supplemental discovery
response; merely pointing to places in the discovery where the
information was mentioned in passing is not sufficient.").

Poitra, 333 F.R.D. at 666.

The Court remains unconvinced that it erred in finding that the

1 information “made known” was not sufficient to dispense with the
2 requirement of supplementation under Rule 26(e).

3 Plaintiff offers the fact that Wendi Wang was deposed after the motion
4 to strike was briefed as new evidence justifying reconsideration of the order
5 as it pertains to her. Ms. Wang was deposed on March 29, 2016,
6 approximately one month after the challenged designations were served and
7 one week after the motion challenging the designations was filed. (See ECF
8 No. 249-1 *15). Defendant argues that Plaintiff could have brought that
9 information before the Court in the original motion and should not be allowed
10 to do so now.

11 The deposition of Ms. Wang after Plaintiff served its supplemental
12 designations is a changed circumstance. The functional equivalent of a
13 proper witness disclosure under Rule 26(a) has now “otherwise [been] made
14 known” to Defendant during the discovery process. Accordingly, the Court
15 reconsiders its ruling striking the supplemental witness designation of Wendi
16 Wang. In all other respects, the Court confirms its prior Order.

17 CONCLUSION

18 Upon reconsideration, the supplemental designation of Wendi Wang
19 may stand. In all other respects, the Court’s Order dated April 8, 2016, is
20 confirmed.

21 **IT IS SO ORDERED.**

22 Dated: June 7, 2016

23 

24 Hon. Mitchell D. Dembin
25 United States Magistrate Judge
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